No. 798

In the Supreme Court of the United States

OCTOBER TERM, 1941

THE SIOUX TRIBE OF INDIANS, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

INDEX

	Page
Opinion Below	1
Jurisdiction	1
Question Presented	2
Statutes and Executive Orders Involved	2
Statement	2
Argument	6
Conclusion	10
Appendix	11

CITATIONS

Statutes:	
Agreement of February 28, 1877, 19 Stat. 254	5, 9
Indian Appropriation Act of August 15, 1876, c. 289, 19 Stat. 176	4, 8
Treaty of 1868, 15 Stat. 635	7, 11
Executive Orders:	
Executive Order of January 11, 1875	12
Executive Order of March 16, 1875	12
Executive Order of May 20, 1875	13
Executive Order of November 28, 1876	14
Executive Order of August 9, 1879	14
Executive Order of March 20, 1884	16

439717—42——1

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OPINION BELOW

The opinion of the Court of Claims (R. 20–30) is not yet reported.

JURISDICTION

The judgment of the Court of Claims sought to be reviewed was entered on April 7, 1941 (R. 30). A motion for a new trial was denied October 6, 1941 (R. 30–31). The petition for a writ of certiorari was filed December 12, 1941. The jurisdiction of this Court is invoked under section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

Whether four executive orders issued in 1875 and 1876 withdrawing from sale and setting apart "for the use of the several tribes of Sioux Indians as an addition to their present reservation" certain lands in the public domain in order to cut off whiskey dealers from access to the Indian settlements, conveyed such an estate to the Indians that they must be compensated for the reopening and settlement of the lands when the occasion for the withdrawal had ceased.

STATUTES AND EXECUTIVE ORDERS INVOLVED

The material portions of the Treaty of 1868 with the Sioux Indians, which set apart their reservation, 15 Stat. 635, the Executive Orders of January 11, 1875, March 16, 1875, May 20, 1875, and November 28, 1876, which withdrew certain land in the public domain from settlement (R. 9, 11, 12, 13–14) and the Executive Order of August 9, 1879, and March 20, 1884, reopening the lands for settlement (R. 16–17, 18) are set out in Appendix, *infra*, pp. 11–16.

STATEMENT

Under authority of the Act of June 3, 1920, c. 224, 41 Stat. 738, the plaintiff filed a petition in the Court of Claims seeking to recover, with interest, the value of approximately 5,600,000 acres of land alleged to have been misappropriated by the United States in 1879 and 1884 (R. 1–6).

The findings of the Court of Claims (R. 7–20) may be summarized as follows:

By Article II of the Treaty of 1868, the United States "set apart for the absolute and undisturbed use and occupation" of the Sioux Indians the Great Sioux Reservation, made up of a large tract of land north of Nebraska and west of the Missouri river and two small existing reservations on the east bank of the river (R. 7–8). In exchange the Sioux relinquished all their claims to any other territory (R. 8).

The treaty opened to settlement the east bank of the river and thus afforded white men carrying on liquor traffic with the Indians ready access to the Great Sioux Reservation (R. 8). By January 8, 1875, this traffic had become such a problem that the Commissioner of Indian Affairs recommended to the Secretary of the Interior, and the Secretary recommended to the President, that the President should withdraw certain lands from sale and set them apart for Indian purposes, such action "being deemed necessary for the suppression of liquor traffic with the Indians upon the Missouri River" (R. 8, 9). On January 11, 1875, the President issued an order that the tract be "withdrawn from sale and set apart for the use of the several tribes of Sioux Indians as an addition to their present reservation" (R. 9). The Indian agencies were notified of the withdrawal, "the same being deemed necessary for the suppression of the liquor traffic"

(R. 9). A month later the Commissioner for Indian Affairs answered a petition sent to the President by settlers in this tract giving the same explanation and stating (R. 10):

> This order does not affect existing rights of any persons, residents within the limits of the Territory withdrawn, nor is it supposed that the withdrawal will be made permanent, or that any purchases will be made by the Government of property owned by individuals, in the tract of country withdrawn.

On three subsequent occasions in 1875 and 1876 the President issued executive orders phrased in the same terms as the Executive Order of January 11, 1875. Each was issued upon the recommendations of the Commissioner of Indian Affairs and the Secretary of the Interior that the withdrawal was necessary to stop the illicit whiskey traffic. Each time the local Indian agents were notified that that was the purpose and on the occasion of the last order they were also notified that it "is not intended to interfere with the vested rights of any settler upon the tract or with the legitimate business pursuits of any person lawfully residing within its limits" (R. 12–14).

After three of these orders had been issued but before the fourth, Congress enacted the Indian Appropriation Act of August 15, 1876, c. 289, 19 Stat. 176, 192, which provided that no future ap-

propriation should be made for the subsistence of the Sioux—

> unless they shall first agree to *relinquish all right and claim to any country outside the boundaries of the permanent reservation established by the treaty of eighteen hundred and sixty-eight* for said Indians; and also so much of their said permanent reservation as lies west of the one hundred and third meridian of longitude. * * * [Italics added.]

The Sioux thereupon executed an agreement, which was ratified by Congress on February 28, 1877 (19 Stat. 254, 255), whereby the north and west boundaries of the Great Sioux Reservation set out by the Treaty of 1868 were modified and "all the territory lying outside the said reservation," as modified, was relinquished to the United States (R. 19–20).

On August 9, 1879, President Hayes issued an order restoring to the public domain the greater part of the lands withdrawn by the Executive Orders of 1875 and 1876 (R. 16–17). On March 20, 1884, President Arthur completed the restoration of the lands withdrawn (R. 18). The orders were issued upon the recommendation of the Commissioner of Indian Affairs that the lands were no longer necessary to protect the Indians from whiskey dealers (R. 15–16, 17–18).

Upon these findings of fact the Court of Claims decided, as a conclusion of law, that the plaintiff

was not entitled to recover (R. 20). Accordingly, the petition was dismissed (R. 30).

ARGUMENT

1. The Court of Claims expressly based its decision upon its interpretation of the Executive Orders of 1875 and 1876, holding that under all the circumstances it was clear that the orders were "intended as a temporary expedient in order to protect the Indians" and were "temporary in their nature and could be withdrawn at any time" (R. 30). The narrow question of the correctness of this interpretation of four executive orders issued and superseded more than fifty years ago has not sufficient public importance to require review by this Court. Nor is there any conflict of decisions to be resolved.

The decision of the Court of Claims, moreover, is plainly correct. The recommendations of the Commissioner and Secretary upon the basis of which the orders were drawn and executed, show clearly that the sole purpose was to curb the illicit whiskey traffic. It would be an extraordinary measure for the President to check this temporary evil by a permanent gift of the entire beneficial ownership of more than 5,600,000 acres of the public domain. The purpose of the orders could be completely achieved by temporarily withdrawing the lands from settlement and thus cutting off white men from access to the Missouri

River until the traffic had ceased.[1] Therefore, although the orders did not expressly state that they were temporary and intended to grant no rights to the Sioux, the phrase "for the use of" the Sioux must be taken to mean for the temporary purpose of protecting the Indians and not for occupation as a permanent home.[2]

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[1] Petitioner's assertion that the Executive Orders were issued for the additional purpose of caring for Indians not living on the Great Sioux Reservation (Pet. 16) is plainly contrary to the recommendations upon which the orders were issued for they state no purpose except to check the liquor traffic (R. 8–14). And, it seems likely that Article VI of the Treaty of 1868, 15 Stat. 635, 637, was designed to give some protection to Indians living off the reservation for it provided:

"* * * And it is further stipulated that any male Indians over eighteen years of age, of any band or tribe that is or shall hereafter become a party to this treaty, who now is or shall hereafter become a resident or occupant of any reservation or territory not included in the tract of country designated and described in this treaty for the permanent home of the Indians * * * and who shall have made improvements thereon of the value of two hundred dollars or more, and continuously occupied the same as a homestead for the term of three years, shall be entitled to receive from the United States a patent for one hundred and sixty acres of land including his said improvements, the same to be in the form of the legal subdivisions of the surveys of the public lands. * * *"

[2] Petitioner's suggestion that the restoration of the lands was based upon a misinterpretation of the statutes punishing illicit whiskey trading (Pet. 17), is immaterial. The record is clear that the Commissioner thought the statutes had been changed so as to enable him to deal with the whiskey traffic even if the lands were reopened, and that that was the reason for reopening them (R. 14–19, 55–59).

439717—42——2

The officers charged with the responsibility of administering the orders interpreted them to have that meaning. The Commissioner of Indian Affairs in 1875 twice advised settlers within the territory embraced by the initial order that it was not intended to interfere with their existing occupancy and their lawful pursuits (R. 10). On one of those occasions he also stated that it was not "supposed that the withdrawal will be made permanent" (R. 10). Later, upon directions from the Secretary of the Interior, he instructed the agents to restrain the Indians from molesting settlers on lands covered by the order (R. 10). These steps are wholly inconsistent with a purpose to grant the lands to the Indians.

Both Congress and the Sioux Indians appear to have interpreted the three Executive Orders of 1875 as adding no additional land to the Great Sioux Reservation. While the Commissioner was giving the above mentioned advice to settlers, Congress enacted the Indian Appropriation Act of August 15, 1876, c. 289, 19 Stat. 176, 192, which provided that no future appropriation should be made for the subsistence of the Sioux "unless they shall first agree to relinquish all right and claim to any country outside the boundaries of the permanent reservation established by the treaty of eighteen hundred and sixty-eight for said Indians * * *" and also to modify the western boundary of the reservation. Thereupon, the

Sioux executed an agreement whereby new north and west boundaries to the reservation were fixed and the Sioux relinquished to the United States "all the territory lying outside the said reservation" as modified. 19 Stat. 254, 255. The provisions of the statute and agreement would have been entirely inappropriate if Congress and the Sioux had considered that the Sioux, as a result of the executive orders, had any rights in territory outside the original reservation.[3] The fourth executive order, which was issued after the enactment of the act, is modelled upon the other three and must be ascribed the same meaning.

2. The petitioner poses certain questions as to the power of the President to create permanent Indian reservations, the taking of which by the United States would entitle the Indians to compensation (Pet. 11, 14–15). No such questions are presented in the present case. The court below decided that the four orders in question were

[3] If the three Executive Orders of 1875 did grant the Sioux any rights in the lands withdrawn from settlement, then the Sioux relinquished such rights by this treaty for they had a full understanding of the requirements of the statute (R. 19). In the court below the petitioner sought to avoid the effect of the release by arguing that "the permanent reservation" and "said reservation" refer to the original reservation plus land covered by the executive orders because provision for additions is made in Article II of the Treaty of 1868. But the statute plainly required the Sioux to relinquish their claims to lands "*outside the boundaries* of the permanent reservation *established by the treaty.*" [Italics supplied.]

valid but concluded that they were not intended to convey any rights to the Sioux. Its decision has no bearing upon the larger question of the validity of executive orders reserving for Indians as a permanent home the use and occupation of lands in the public domain. Plainly, this question of the power of the President to alienate lands in the public domain, does not arise until it is shown that he attempted to exercise it.

CONCLUSION

The decision of the court below is correct and presents no conflict of decisions or question of general importance. Therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
ROGER P. MARQUIS,
ARCHIBALD COX,
Attorneys.

JANUARY 1942.

APPENDIX

Treaty of 1868 between the United States and the Sioux Nation, ratified February 16, 1869, 15 Stat. 635:

ARTICLE II

The United States agrees that the following district of country, to wit, viz: commencing on the east bank of the Missouri River where the forty-sixth parallel of north latitude crosses the same, thence along low-water mark down said east bank to a point opposite where the northern line of the State of Nebraska strikes the river, thence west across said river, and along the northern line of Nebraska to the one hundred and fourth degree of longitude west from Greenwich, thence north on said meridian to a point where the forty-sixth parallel of north latitude intercepts the same, thence due east along said parallel to the place of beginning; and in addition thereto, all existing reservations on the east bank of said river shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents, and employes of the government as

may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article, or in such territory as may be added to this reservation for the use of said Indians, and henceforth they will and do hereby relinquish all claims or right in and to any portion of the United States or Territories, except such as is embraced within the limits aforesaid, and except as hereinafter provided.

Executive Order of January 11, 1875 (R. 9):

EXECUTIVE MANSION,
January 11, 1875.

It is hereby ordered that the tract of country in the Territory of Dakota lying within the following described boundaries, viz: Commencing on the east bank of the Missouri River where the forty-sixth parallel of north latitude crosses the same; thence east with said parallel of latitude to the ninety-ninth degree of west longitude; thence south with said degree of longitude to the east bank of the Missouri River; thence up and with the east bank of said river to the place of beginning, be, and the same hereby is, withdrawn from sale and set apart for the use of the several tribes of Sioux Indians as an addition to their present reservation in said Territory.

U. S. GRANT.

Executive Order of March 16, 1875 (R. 11):

EXECUTIVE MANSION,
March 16, 1875.

It is hereby ordered that the tract of country in the Territory of Dakota lying within the following-described boundaries, viz, commencing at a point where the one

hundred and second degree of west longitude intersects the forty-sixth parallel of north latitude; thence north on said one hundred and second degree of longitude to the south bank of the Cannon Ball River; thence down and with the south bank of said river to a point on the east side of the Missouri River, opposite the mouth of said Cannon Ball River; thence down and with the east bank of the Missouri River to the mouth of Beaver River; thence up and with the south bank of Beaver River to the one hundredth degree of west longitude; thence south with said one hundredth degree of longitude to the forty-sixth parallel of latitude; thence west with said parallel of latitude to the place of beginning, be, and the same hereby is, withdrawn from sale and set apart for the use of the several tribes of Sioux Indians as an addition to their present reservation in said Territory.

U. S. GRANT.

Executive Order of May 20, 1875 (R. 12):

EXECUTIVE MANSION,
May 20, 1875.

It is hereby ordered that that portion of the public domain in the Territory of Dakota lying south of an east and west line from the northwest corner of the Yankton Indian Reservation to the ninety-ninth degree of longitude, and between said longitude and the Missouri River on the west and the Yankton Indian Reservation on the east, be, and the same hereby is, withdrawn from sale and settlement and set apart for the use of the several tribes of Sioux Indians as an addition to their present reservation in said Territory.

U. S. GRANT.

Executive Order of November 28, 1876 (R. 13):

EXECUTIVE MANSION,
November 28, 1876.

It is hereby ordered that the tract of country in the Territory of Dakota on the east side of the Missouri River, lying within the following boundaries, viz: Commencing at a point on the south bank of Beaver River, intersected by the one hundredth degree of west longitude; thence in a direct line to the east corner of the Fort Rice Military Reservation; thence in a southwestern direction along the said military reservation to the east bank of the Missouri River; thence with the east bank of the Missouri River to the mouth of Beaver River; thence up and with the south bank of Beaver River to the place of beginning, be, and the same hereby is, withdrawn from sale and set apart for the use of the several tribes of Sioux Indians as an addition to their present reservation in said Territory.

U. S. GRANT.

Executive Order of August 9, 1879 (R. 16–17):

EXECUTIVE MANSION,
August 9, 1879.

It is hereby ordered that all that portion of the Sioux Indian Reservation in Dakota Territory created by Executive orders dated January 11, March 16, and May 20, 1875, and November 28, 1876, lying within the following-described boundaries, viz: Beginning at a point where the west line of the Fort Randall Military Reservation crosses the Missouri River; thence up and along said river to the mouth of American Creek; thence up and along said creek to the ninety-ninth degree of west longitude; thence south along said degree to a point

due west from the northwest corner of the Yankton Indian Reservation; thence due east to the northwest corner of said reservation; thence due south to the north boundary line of Fort Randall Military Reservation; thence following said boundary line northwesterly to the northwest corner of said military reservation; thence south on the west boundary line of said reservation to the place of beginning. And also the following-described land: Beginning at the east bank of the Missouri River at the mouth of Medicine Knoll Creek; thence up and along the Missouri River to the boundary line of Fort Sully Military Reservation; thence northeasterly along said boundary line to the southeast corner of said military reservation; thence northwesterly along the boundary line of said reservation to the northeast corner thereof; thence due north to the east bank of the Missouri River; thence up and along the east bank of said river to the mouth of the Bois Cache; thence due north to the east bank of the Missouri River; thence up and along the east bank of said river to the south line of township 129 north; thence east along said township line to the line between ranges 78 and 79 west; thence north along said range line to Beaver Creek, or the north boundary line of the reservation set aside by the Executive order of March 6, 1875; thence west along said creek to the east bank of the Missouri River; thence up and along said east bank to the southeast corner of Fort Rice Military Reservation; thence northeasterly along said military reservation to the east corner of said reservation; thence in a direct line to a point on the south bank of Beaver Creek where said creek is inter-

sected by the one-hundredth degree of west longitude; thence south with said one-hundredth degree of longitude to the forty-sixth parallel of north latitude; thence east with said parallel of latitude to the ninety-ninth degree of west longitude; thence south with said degree of longitude to its intersection with the north boundary line of the old Sioux or Crow Creek Reservation; thence west along the north boundary line of said reservation to the eastern boundary line of the old Winnebago Reservation; thence north along said east line to the northeast corner of said Winnebago Reservation; thence west along the north boundary line of said reservation to the middle channel of Medicine Knoll Creek; thence down the middle channel of said creek to the place of beginning, be, and the same hereby is, restored to the public domain.

R. B. HAYES.

Executive Order of March 20, 1884 (R. 18):

EXECUTIVE MANSION,
March 20, 1884.

It is hereby ordered that the lands embraced within the three existing Executive additions to the Great Sioux Reservation, in Dakota, east of the Missouri River, viz, the one opposite the Standing Rock Agency, the one opposite the mouth of Grand River and the site of the old Grand River Agency, and the one opposite the mouth of Big Cheyenne River and the Cheyenne River Agency, be, and the same are hereby, restored to the mass of the public domain, the same being no longer needed for the purpose for which they were withdrawn from sale and settlement.

CHESTER A. ARTHUR.

U. S. GOVERNMENT PRINTING OFFICE: 1942